COMPLIANCE BOARD OPINION NO. 02-13

October 28, 2002

Mr. Conrad Potemra

The Open Meetings Compliance Board has considered your complaint that the Commissioners of Poolesville violated the Open Meetings Act in connection with a closed meeting on February 26, 2002. The complaint itemizes eleven alleged violations. As explained below, the Compliance Board finds that the Commissioners violated the Act in some, but not all, of the aspects of the February 26 meeting identified in the complaint.

In order to provide a clear organizational structure for this opinion, each element of the complaint, the Town's response to that element, and the Compliance Board's analysis are set forth below under appropriate topical headings. Consequently, the sequence by which issues are discussed in this opinion varies from the sequence of allegations in the complaint.

I

Factual Background

The Commissioners met on February 26, 2002, at 6:00 p.m. on the second floor of Town Hall. The notice of the meeting stated as follows:

> The Commissioners of Poolesville are meeting in executive session as provided for by the Annotated Code of Maryland, State Government Article: Section 10-508(a)7 & 8 to obtain legal advice and consult with counsel and staff on possible litigation and Section 10-508(a)1(i) to discuss a personnel matter (Town Manager position). The public is not invited to attend.

The minutes of the meeting (as approved by the Commissioners on July 8, 2002) indicate that the closed session "was called for the purpose of discussing those several homeowners whose wells will be adversely affected by the operation of [two new Town wells]." Those present at the meeting included all of the Commissioners, the Town Engineers, the Town Attorney, and Mr. Matthew Pajerowski, an official of the Maryland Department of the Environment.

As we understand the situation, based on material provided in the complaint and the Town's response, Poolesville residents obtain potable water from wells. In order to increase the water supply, the Town is proposing to drill two new wells. Under State law, however, if the new wells will have an adverse affect on existing wells drawing from the same aquifer, the Town must make suitable provisions for the private well owners who will be adversely affected. As summarized in an e-mail from Mr. Pajerowski, "a few wells were almost certain to be impacted, and I asked the Town to pursue some agreement with the well owners, to assure that the well owners were hooked to public water, or otherwise were assured of an adequate, alternate water supply in the event that the new Town wells adversely affected the private wells." Indeed, whether the Town was able to resolve successfully the problem of adverse impact on privately owned wells would be a factor in the State's decision making on permit applications for the new wells.

The Commissioners unanimously voted to close the meeting "to discuss the proposals to extend [offers] to these residents as well as to receive advice from the Town Attorney and Town Engineers." Mr. Pajerowski first "explained the administrative process for residents whose wells will be adversely affected. If the Town failed to reach agreement with the residents, they are afforded an adversary ('contested case') hearing ..." on the issue of mitigating the effect of the new wells. Then potential proposals to the well owners were discussed.

The second aspect of the meeting involved what the Town described as "a presentation by the Town Engineer's consultant ... regarding whether there existed wetlands on a Town park. A complaint had previously been made by a Town resident to the Commissioners that such in fact existed, and the resident advised that if appropriate action was not taken, he would report the Town to the Corps of Engineers."

The third aspect of the meeting, according to the Town, involved a discussion of candidates for the position of Town Manager. This discussion included the residency requirement in the Town Code, as it affected a particular candidate. The Commissioners "determined that the residency requirement should be deleted from the Code and dealt with in the Town Manager's contract ...."[1]

[1] The complaint alleged that the omission of information about this third aspect of the meeting from the minutes violated the Act. *See* Part V below. The complaint did not allege, however, that the conduct of this discussion in closed session was unlawful; consequently, we do not address the question whether the discussion exceeded the limits of the applicable exceptions.

II

Choice of Site and Meeting Notice

A. Accessibility of Meeting Site

The complaint alleged that the February 26 closed session "was held in a small, second floor meeting room, accessible only by a stairway at Poolesville Town Hall." In response, the Town confirmed that the meeting was held in the Town Hall, not the usual barrier-free meeting place, but contended that no violation occurred, because all agenda items were expected to be discussed in closed session and no one called to request assistance in attending the meeting.

In a prior opinion, we pointed out that, although the Open Meetings Act does not require that all meetings be held in barrier-free facilities, "a public body may not deny, through its choice of meeting site, the right of a person with a disability to observe an open meeting – even one that is open only for the brief time that it takes to follow the procedures for closing a meeting." Compliance Board Opinion No. 97-9 (May 20, 1997), *reprinted in* 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 237, 239. The Act requires that, when a public body meets in a facility which is not barrier-free, the public body provide any requested assistance to enable members of the public with disabilities to attend the open portion of the meeting.

In this case, there is no evidence that anyone requested assistance but was denied it. Hence, the Compliance Board finds no violation arising from the Town's choice of meeting site alone. *See* Compliance Board Opinion No. 97-11 (May 29, 1997), *reprinted in* 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 245.

B. Notice of the Meeting

This aspect of the complaint alleged inadequacies in the time and manner of notice. The complaint pointed out that, given the attendance of persons based outside of Poolesville, "it is logical to think that there was plenty of notice provided to the attendees." However, "there was not the same advance notice provided to the citizens." The complaint further commented on the lack of documentation of when the notice of the meeting was posted at Town Hall and made the point that no recorded message about the meeting was left on the Town Hall Phone Bulletin Board. In its response, the Town noted that the February 26 meeting was not a regularly scheduled one but rather a special meeting. The response stated that the Deputy Town Clerk recalled posting the notice "on the Town Hall door and at a local supermarket per usual practice on the Friday preceding this meeting ...." The

response indicated uncertainty whether a recorded message about the meeting had also been prepared.

With respect to the timing of notice, the Open Meetings Act simply provides that "a public body shall give reasonable advance notice ...." §10-506(a) of the State Government Article. It appears that the February 26 meeting was not finally set until all of the participants were known to be available; as the Town put it, "it is clear that arranging for all participants' availability is a matter than can be easily crowd the time notice is posted." In the absence of evidence of any intentional delay in the provision of notice, we cannot say that posting of notice on a Friday about a meeting on Tuesday of the following week is unreasonable.

The Act also allows a public body to use "any reasonable method" of giving notice to the public, including "by posting or depositing the notice at a convenient public location at or near the place of the session." §10-506(c)(3) and (4). The posting on the door of Town Hall and at a local supermarket satisfies this requirement. Although the practice of preparing a recorded message about a meeting is commendable, this additional form of notice is voluntary, not required by the Act. Consequently, the failure to provide recorded notice of the February 26 meeting is not a violation.[2]

III

Legal Basis for Closing Meeting

A. Discussion of Impact of New Wells

The complaint contended that discussion of the proposals to the well owners should have been open to public observation after legal advice was rendered. The situation involving the wells, the complaint suggested, involved policy matters of great public interest and importance related to a healthy and plentiful water supply.

The complaint also included a copy of an e-mail from Mr. Pajerowski in which he stated his willingness "to meet with elected officials, or the general public, to help them understand how the laws and regulations pertaining to water appropriation permitting apply to their situation, particularly that when understanding could help resolve potential conflicts between various water users." From this statement, and from the description of this portion of the closed session in the minutes, the complaint drew the conclusion that this portion of the closed meeting "would be eligible for the public to hear and not a legal reason to close the meeting."

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[2] See Part III B below for a discussion of an additional issue about the contents of the meeting notice.

According to the Town's response, Mr. Pajerowski's presentation was intended to enable the Commissioners to understand "the legal and administrative apparatus of handling the residents whose wells were anticipated to be adversely affected by [the new] wells." After this presentation, "the Commissioners then discussed the individual needs of the five affected residents, and devised proposals for each. These, of course, are contract negotiations which ... are protected under the Open Meetings Act pursuant to ... §10-508(a)(14)." The Town's response also suggested that this discussion was permissibly closed under §10-508(a)(7) and (8), which permit a public body's attorney to render advice, or a public body to discuss pending or potential litigation, in a closed session. The Town acknowledged that the public has a legitimate interest in Town water policy, but argued that the discussion of individual offers to the five home owners affected by the new wells was not a matter appropriate for discussion in public.

The exception that the Town principally relies on, §10-508(a)(14), does not apply to this situation. This exception allows a public body to meet in closed session "before a contract is awarded or bids or opened, [to] discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." The wording of the exception makes it evident that it was drafted to deal with the particular situation of a public body's procurement of goods or services. That is why it refers to a "competitive bidding or proposal process." This exception may not be expanded beyond the procurement setting to encompass *any* contractual negotiation. To do so would violate the rule of construction that all exceptions in §10-508 "shall be strictly construed in favor of open meetings of public bodies." §10-508(c).

The Poolesville Commissioners are not procuring anything from the private well owners. Instead, if the Commissioners drill the new wells, they may harm the interests of the well owners and are obliged by State law to rectify the harm. This situation does not involve a competitive bidding or proposal process by which a public body procures goods or services.

Nevertheless, merely because the exception in §10-508(a)(14) is inapplicable, it does not follow that discussion of possible proposals to the well owners had to be conducted in open session. This was a legally delicate matter: On the one hand, the Commissioners would not want to bear costs greater than necessary. On the other hand, too meager an offer would risk litigation and delay in the permits for the Town's new wells. The Commissioners would surely need advice of counsel. Moreover, given the relevant law regarding the permitting process for new wells, the offers to the well owners were directly linked to readily foreseeable administrative litigation, about which the Commissioners could reasonably seek both legal and

engineering advice.[3] Therefore, the Commissioners were entitled to invoke the legal advice and litigation exceptions, §10-508(a)(7) and (8), to close the portion of the meeting during which proposals to the well owners were discussed.[4]

These exceptions, however, do not extend to the earlier portion of the meeting during which Mr. Pajerowski explained the requirements of State law. This was a distinct, prefatory element of the meeting. There is no suggestion that Mr. Pajerowski's presentation itself was intertwined with the rendering of legal advice by the Town Attorney. Nor is plausible to suppose that Mr. Pajerowski was consulted confidentially about potential litigation. To the contrary, he was providing background information, just as he would have to members of the public. Undoubtedly, the Commissioners made use of that information in their subsequent discussion of proposals to the well owners, but Mr. Pajerowski was not participating as if he were a consultant to the Commissioners on the specifics of the offers and the risk of litigation that a given offer might incur.

In short, we find that, although the Commissioners had a basis under the Act for closing the portion of the meeting at which offers to the well owners were discussed, they had no basis for closing the earlier presentation by Mr. Pajerowski. They violated the Act by doing so.

B. Presence of, and Advice From, Town Engineers

The complaint argued that the Act does not authorize a closed session to hear engineering advice. "The engineering information should have been provided in an open session. Furthermore, the meeting public notice does not state that engineers would be present or offering advice." The complaint also commented on the absence of evidence in the meeting minutes that any type of litigation with concrete potential was discussed.

The Town responded that the advice of the engineers was permissibly sought in closed session under §10-508(a)(8), because the Commissioners "sought advice on the well-offer issue as well as the wetlands issue. Both clearly have or then had a great chance of developing into litigation." The Town further stated that a meeting notice is not required to list the expected attendees.

The litigation exception, §10-508(a)(8), allows a public body to meet in closed session to "consult with staff, consultants, or other individuals about pending or potential litigation." Unquestionably, such consultation might, depending upon

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[3] *See* Part IIIB below for further discussion of the exception for potential litigation.

[4] As discussed in Part IV below, the Commissioners failed to carry out all of the required procedures to invoke these exceptions properly.

the facts of the pending or potential litigation, involve engineering advice. Therefore, we find no violation merely because advice was given by an engineer in this context.

Yet, this exception may not be invoked with respect to "potential litigation" unless that potential is a palpable and concrete one. *See, e.g.,* Compliance Board Opinion No. 97-9 (May 20, 1997), *reprinted in* 1 *Official Opinions of the Maryland Open Meetings Compliance Board* 237, 240. The possibility that, at some time in the future, a disgruntled resident or a government agency might file suit is insufficient.

Unlike the situation regarding the new wells, the Town's description of the problem with the possible wetlands in the Town park does not provide evidence of an adequate basis for invoking the litigation exception. Certainly, not every citizen complaint to the Corps of Engineers results in litigation. The mere prospect of such a complaint is insufficient to make the potential for litigation over this issue concrete. Thus, we conclude that this aspect of the February 26 closed meeting violated the Act.

Finally, we conclude that the Town's omission of specific reference to the likely presence of the Town's engineers in the meeting notice was not itself a violation. The Act does not require that a meeting notice contain an identification of those expected to attend or participate in the meeting.

IV

Procedure for Closing Meeting

The complaint pointed out that "the Commissioners are required to have the President or his representative open the meeting" and then carry out the procedures for closing it, including the preparation of the written statement required by §10-508(d)(2)(ii). The minutes, according to the complaint, indicate that this requirement was not met.

The Town responded as follows:

> Simply because the minutes (as currently approved) do not indicate that the President opened the meeting did not mean that he did not do so. Indeed, all Commissioners were present, and there was no deviation from the Commissioners' practice that he in fact did open the meeting. Further, the fact that the text of the motion to close the meeting is not in the minutes does not indicate a violation. The notice of the meeting

> ... notes the agenda and the reasons [to] close the meeting. They are adequate for each agenda item. Further, the Commissioners' practice is to read that notice verbatim as the motion to close, as was undoubtedly done in this case.

The Town's response thus suggested that the presiding officer carried out the duty specified in §10-508(d)(2)(i) to "conduct a recorded vote on the closing of the session." We see no legal objection to the practice of using, as a template for a motion to close a meeting, the substance of a notice indicating the basis for a closed meeting.

The problem, however, is that the Act imposes an additional requirement on the presiding officer, which is to "make a written statement of the reason for closing the meeting, including a citation of the authority under the section, and a listing of the topics to be discussed." §10-508(d)(2)(ii). The Town has neither supplied that written statement nor indicated that one was in fact prepared. The failure to prepare one prior to closing the February 26 meeting violated the Act.

V

Delay in Preparation of, and Omission of Information From, Minutes

The complaint pointed to a discrepancy between the notice of the meeting and the minutes available to the public. The former identified part of the basis for holding a closed meeting as an intent "to discuss a personnel matter (Town Manager position)." The latter contained no reference to such a discussion. The complaint characterized this omission from the minutes as an effort "to hide information from the public." The complaint also noted a substantial delay in the preparation of the minutes. Finally, the complaint alleged that the information about the closed February 26 meeting that should have been disclosed to the public under §10-509(c)(2) was not disclosed.

The Town's response denied any intention to hide information and described an "unusual set of circumstances that led to the creation of incomplete minutes." The Town Attorney, present at the meeting, took notes from which minutes were to be prepared. These notes, however, were misplaced. Apparently, no one else at the meeting took notes suitable for preparation of minutes, so after a lapse of several months, the Town Attorney prepared minutes based on his recollection of the meeting.

The minutes are conceded by the Town to be incomplete. The response indicated that, the Town Attorney's notes having recently been located, a new and more substantial set of minutes are to be prepared and submitted to the

Commissioners for approval. These circumstances, the Town contended, reflect "no intent to deceive anyone: it was an unfortunate occurrence."

The Compliance Board, lacking investigatory authority, ordinarily is unable to draw inferences about intent. Instead, the Board looks at the actions of a public body to discern whether they comport with the Act. Here, there were two violations. The minutes of every meeting, whether open or closed, are to reflect, among other things, "each item that the public body considered." §10-509(c)(1)(i). The minutes of the February 26 meeting concededly omit any reflection of the Commissioners' consideration of the Town Manager position and, therefore, this provision was violated. Similarly, with respect to any meeting closed under the Act, a public body is required to include, in the minutes of its next open session, among other things, "a listing of the topics of discussion ...." §10-509(c)(2)(iv). If the minutes about the February 26 meeting released to the public are intended to satisfy this requirement, they do not do so.

A public body is required to have procedures in place to assure that minutes with the requisite content are prepared in a timely way. The disappearance of the notes was indeed unfortunate but cannot serve as an excuse for depriving the public, for several months, of information that the Act required to be made available. Therefore, the Commissioners violated the Act.

VI

Conclusion

The Open Meetings Compliance Board determines that the Commissioners of Poolesville violated the Open Meetings Act by the exclusion of the public from the portions of the February 26, 2002 meeting at which Mr. Pajerowski made his presentation and at which the Town Engineer's consultant discussed the wetlands issue; the failure to prepare a written statement prior to closing the meeting; and the failure to prepare sufficiently descriptive minutes in a timely manner. The Commissioners did not violate the Act by their choice of location for the meeting; the manner, timing, and content of the meeting notice; the manner in which the motion to close the meeting was made; and the exclusion of the public from the discussion of offers to the private well owners.

OPEN MEETINGS COMPLIANCE BOARD

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